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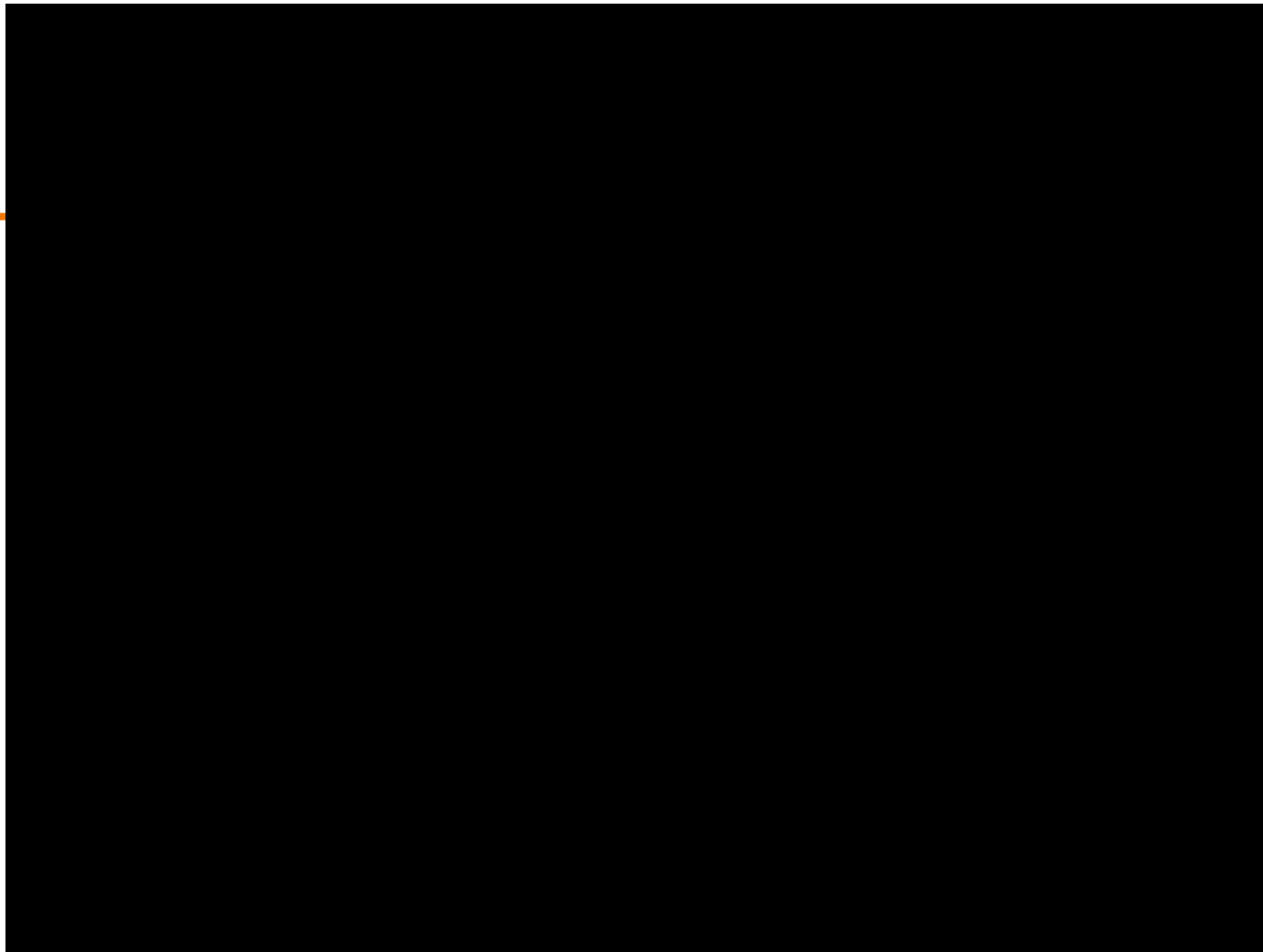
U.S. News & World Report

LABOR LAW –
MANAGEMENT
2015

Privacy and Social Media In the Workplace

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Employer's Right to Know vs. Employee's Right to Privacy

- Past: workplace privacy focused on lockers and desk drawers
- Now: workplace privacy focused on electronic data, including social media
- Fine line to keep balanced



Invasion of Privacy

- Intrusion upon seclusion
 - an intrusion;
 - that is highly offensive; and
 - into some matter in which a person has a legitimate expectation of privacy
- Employees will likely have a difficult time proving the second and third elements

If it's on the Internet, it isn't private.



DonkeyHoney

Invasion of Privacy

- **Moreno v. Hanford (non-employment case)**
 - Student issued online rant (MySpace) against hometown that was republished in newspaper and led to family's business being run out of town
 - Court rejected invasion of privacy claims
 - Reasoned MySpace posting was publicly available and thus could not support a privacy claim

Invasion of Privacy

- Stengart v. Loving Care Agency
 - New Jersey Appellate Court
 - Employee did not waive attorney-client privilege by communicating with her attorney through her personal Yahoo email, using work computer
- Holmes v. Petrovich Development Co.
 - California Court of Appeals
 - Disagreed with Stengart, reasoned employee emailing her attorney from computer was like “consulting her lawyer in her employer’s conference room, in a loud voice, with the door open”

Stored Communications Act, Wiretap Act, and Electronic Monitoring Statutes

- Address access to stored wire and electronic communications and transactional records
- SCA only protects communication where employee had a reasonable expectation of privacy
- Interception vs. Transmission
 - *Konop v. Hawaiian Airlines, Inc.*

SCA Protected: Electronic Storage

■ Electronic storage

- Any temporary intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof;
- Any storage of such communication by an electronic communication service for purpose of backup protection of such communication

■ Are the contents of websites held in electronic storage?

SCA Not Protected



- Communication readily accessible to the general public
- Facebook/Twitter/Instagram
 - Depends on the degree of security enabled by the employee

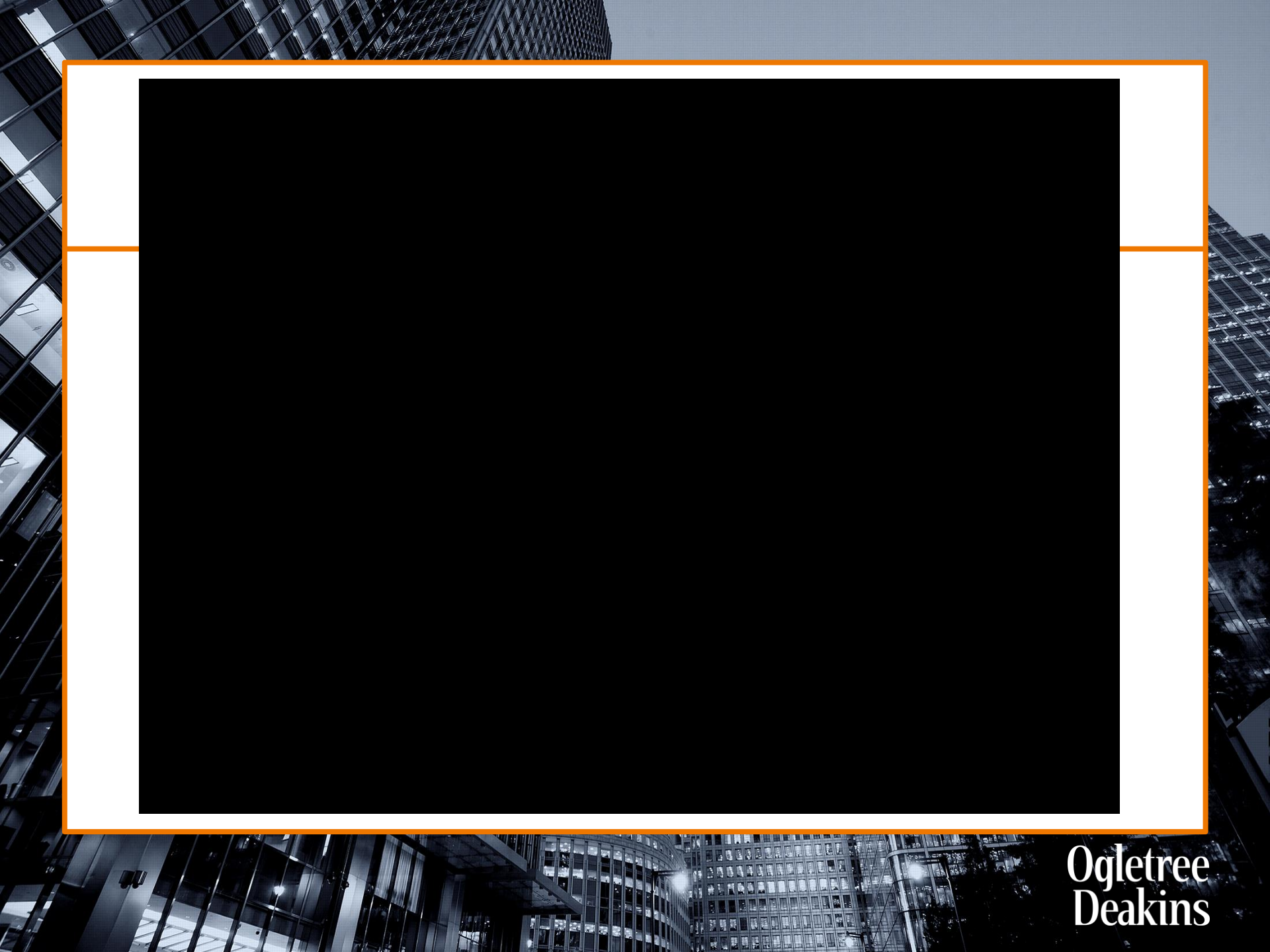
Monitoring

■ Federal Laws

- Electronic Communications Privacy Act (ECPA)
 - Protects the privacy of some electronic communications and makes intentional interception of wire, oral, or electronic communications unlawful
 - Stored Communications Act (SCA)
 - Protects stored wire and electronic communications, including email
 - Public employees: unreasonable search and seizures
- ## ■ Monitor for misuse/overuse of email, Internet, etc.

Social Media Policies

- No expectation of privacy on company equipment
- Specify what activity is allowed
- Identify time limits, if any
- Integrate present policies
 - Anti-discrimination
 - Anti-harassment
- Not too restrictive (NLRB implications)



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Employer Use of Social Networking Sites

- Marketing tool – reach broad customer base
- LinkedIn Accounts for sales associates or other employees



Eagle v. Morgan

- Eagle had personal premium LinkedIn account she paid for personally
- Shared her password with staff to update profile and respond to invitations
- Company didn't have policy regarding ownership of social media accounts
- Eagle was fired soon after company bought out
- Company locked her out of her LinkedIn account by changing her password
- Eagle sued alleging misappropriation of her identity and identify theft among others
- Court found for Eagle on three counts but rejected damages claims entirely

Off The Job Behavior

- Risks arising from employees using social media
 - Offending customers and clients
 - Negative publicity
 - Defamation
 - Intellectual property infringement
 - Trade secret disclosure
 - Fraud
 - Privacy-related torts

NLRB and Social Media

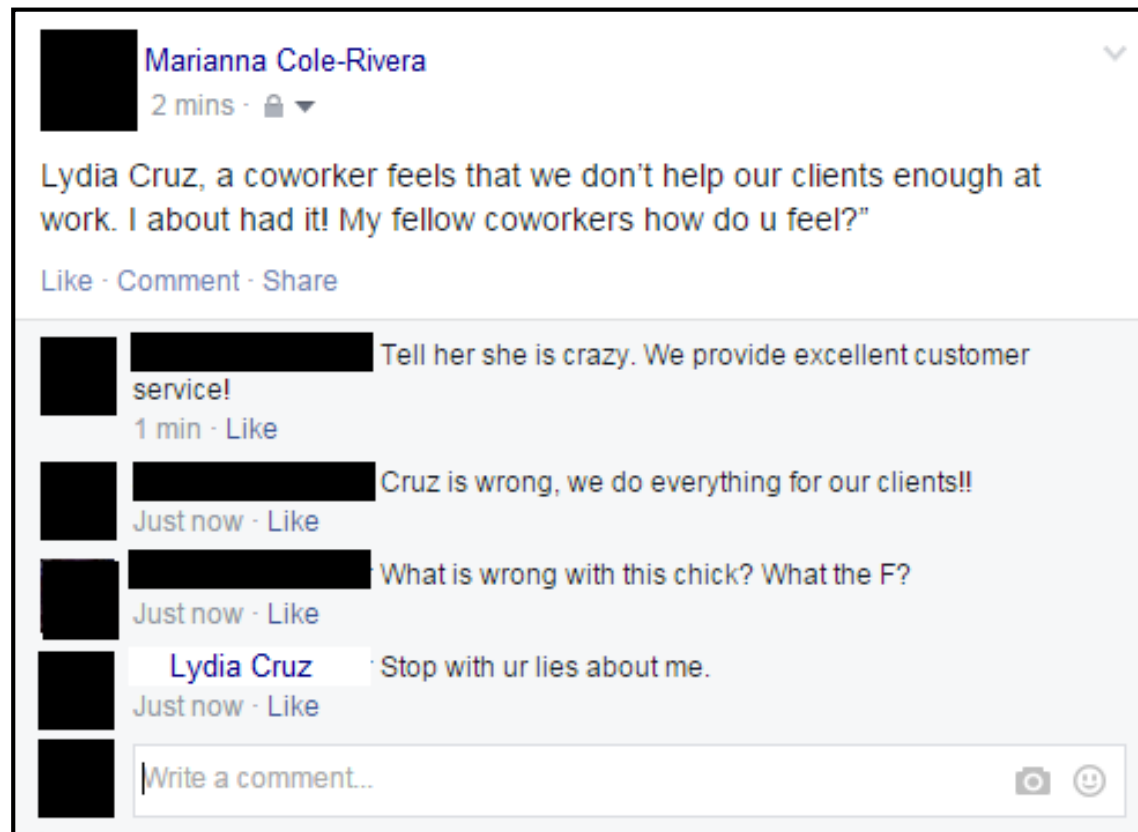
■ Protected Concerted Activity

- Activities workers may partake in without fear of employer retaliation.
- “Employees have the protected Section 7 right to discuss their terms and conditions of employment with each other, or even with non-employees (such as union representatives, spouses, friends, former employees, and even customers)...”
- “Any rule or policy that employees would reasonably construe as prohibiting them from engaging in such Section rights will likely be found unlawfully broad...”

Protected Concerted Activity	NOT Protected Concerted Activity
Acting with or the authority of other team members to initiate, induce or prepare for group action	Conduct solely by and on behalf of the team member
Bring group complaints to the attention of management	Comments that are mere griping as opposed to “group action”
Engaging in activities that are the logical outgrowth of concerns expressed by the employees collectively	Outrageous or over-the-top rants, or unlawful, violent or discriminatory comments.

Social Media Termination Examples

Is this protected concerted activity?



Should I Terminate?

-----Original Message-----

From: Kevin Colvin [mailto:]
Sent: Wednesday, October 31, 2007 3:55 PM
To: Jill Thompson (North America)
Cc: Paul Davis (North America)
Subject:

Paul/Jill -

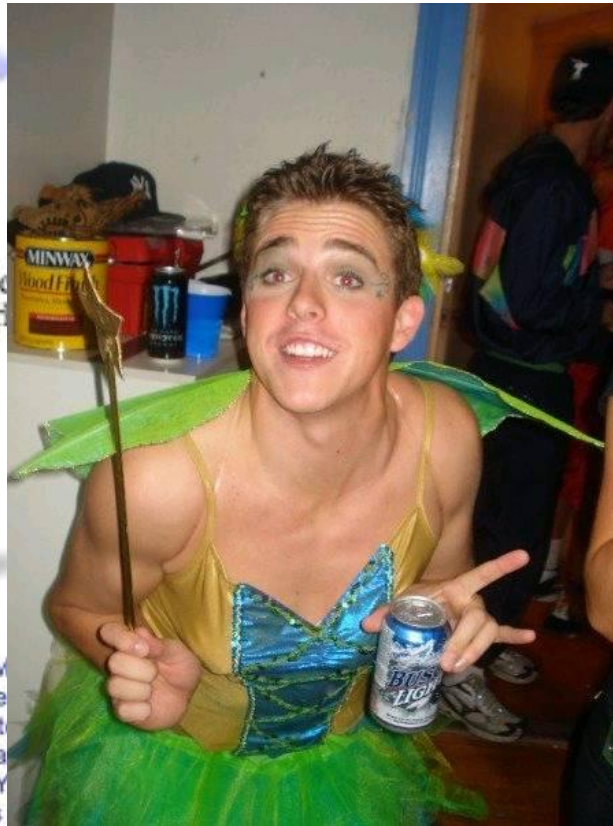
I just wanted to let you know that I will not be able to come up at home and I had to go to New York. I apologize for the delayed notice.

Kind regards,

Kevin

From: [redacted]
Date: Nov 1, 2007
Subject:

There is a new intern on my team who has moved down to the bottom you can see the picture. He wouldn't be able to come into work tomorrow so I pulled up his face book page (similar to mine). He basically said he had to go to NY for Worcester for Halloween. Below is



); Kevin Colvin (North America)

ng is ok in New York. (cool wand)

scroll
he
mine
night- so

Should I Terminate?



██████████ OMG I HATE MY JOB!! My boss is a total pervy wanker always making me do shit stuff just to piss me off!! WANKER!

Yesterday at 18:03 · Comment · Like



Hi ██████████, i guess you forgot about adding me on here?

Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that i'm gay? I know i don't prance around the office like a queen, but it's not exactly a secret. Thirdly, that 'shit stuff' is called your 'job', you know, what i pay you to do. But the fact that you seem able to fuck-up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, i'm serious.

Yesterday at 22:53

Write a comment...

Should I Terminate?

Company sponsors a social networking site designed to solicit discussion and ideas. Jose posts a blog entry that states that he has information that indicates that the company is engaged in fraudulent financial reporting and that someone should look into it. Jose is laid off 2 weeks later in connection with a reduction in force.

What is the obligation of the Company to monitor its blogs to learn about such complaints?

What actions should or shouldn't be taken?

Does Jose have a whistleblower claim?

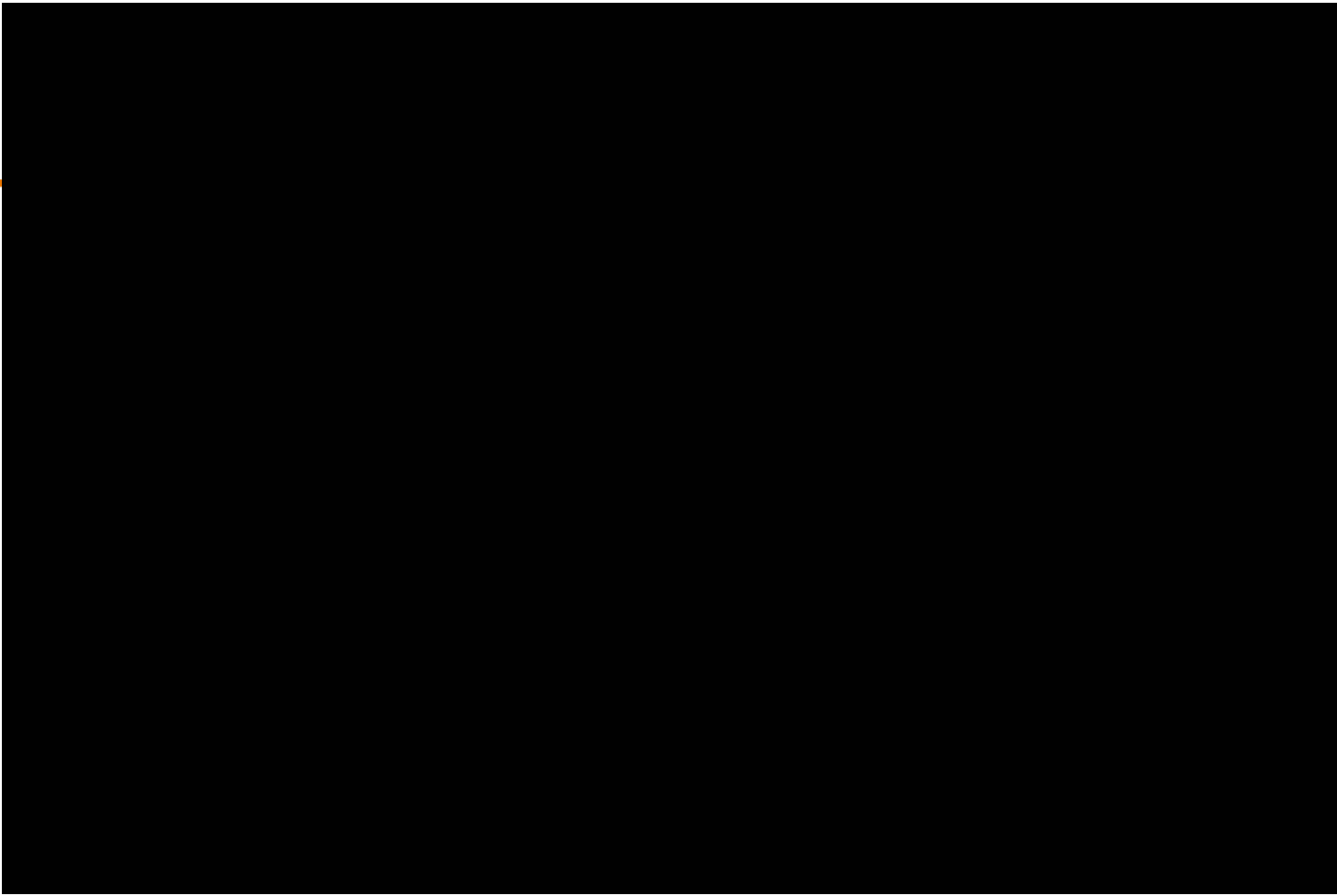
Should I Terminate?

Frank asks his coworker Sallie to join his Facebook page. Sallie accepts and subsequently looks at the pictures Frank has posted to his site. Sallie sees a picture of Frank kissing multiple, scantily clad women. The remarks about the pictures are derogatory and demeaning. Sallie complains to HR.

What actions should the company take?

Does the situation change if instead of Facebook it is a company sponsored blog?

What about a blog that the company hosts on its website solely for employees' personal use?







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